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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS ESTRADA,

Defendant and Appellant.

F076848

(Super. Ct. No. SF017647A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Judith K. Dulcich, Judge.

Charles M. Bonneau III, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Franson, J. and Snauffer, J.

After a jury found appellant Juan Carlos Estrada guilty of possession of a weapon while in prison, in a bifurcated trial the court found appellant suffered a prior Penal Code<sup>1</sup> section 245, subdivision (a)(1) conviction, and that the conviction constitutes a strike. In a previous appeal, we held the trial court's finding was not supported by substantial evidence and remanded the matter for retrial and/or resentencing in accordance with *People v. Barragan* (2004) 32 Cal.4th 236, 239, 241-242. (*People v. Estrada* (Mar. 17, 2017, F070063) [nonpub. opn.].)<sup>2</sup> Following remand, the trial court retried the issue of the truth of appellant's prior conviction and based on additional documentary evidence presented by the People, the trial court again found appellant's prior conviction constitutes a prior strike.

Appellant contends the trial court's finding on the retrial of the truth of his prior conviction was not supported by substantial evidence. We conclude the additional evidence presented at retrial was sufficient to support the trial court's finding, and affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Initial Trial Court Proceedings**

The Kern County District Attorney's Office filed a one-count complaint alleging appellant possessed a weapon in prison. (§ 4502, subd. (b).) The complaint further alleged appellant was previously convicted in Orange County of a violation of "PENAL CODE [SECTION] 245 (A)(1)" and that the conviction qualifies as a strike for sentencing purposes. (§§ 667, subds. (c)-(j), 1170.2, subds. (a)-(e).)

A jury found appellant guilty of the substantive offense, and he waived his right to a jury trial on the truth of the prior conviction. In the bifurcated bench trial that followed, the People introduced a copy of the abstract of judgment as proof of the prior conviction.

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<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> On the court's own motion, we take judicial notice of the prior opinion in *People v. Estrada*, *supra*, F070063.

The abstract indicated that on August 22, 2013, a jury convicted appellant of a violation of section 245, subdivision (a)(1), and further listed the offense as “Assault with deadly weapon other ....” The abstract also contained a checked box indicating the offense was a “Serious Felony.” Based on the abstract, the trial court found the prior strike allegation true, and enhanced appellant’s sentence accordingly.

## **II. Initial Appeal**

Appellant challenged the trial court’s ruling on appeal, claiming the ruling was not supported by substantial evidence because the abstract of judgment did not conclusively establish the jury’s verdict was based on the elements of assault with a deadly weapon. In *People v. Estrada, supra*, F070063, we agreed and remanded the case for retrial of the allegation and/or resentencing.

We began our opinion by noting that in 2011 when appellant committed the prior violation of section 245, subdivision (a)(1), the previous version of the statute set forth two alternative ways to commit the offense: assault with a deadly weapon other than a firearm, and assault with force likely to produce great bodily injury.<sup>3</sup> Under section 1192.7, subdivision (c)(31), assault with a deadly weapon constitutes a serious felony and therefore is a strike under section 667, subdivisions (d)(1) and (e)(1). Conversely, assault with force likely to cause great bodily injury is not a strike.

Next, we explained that a trial court must employ a “categorical” approach in applying recidivist sentence enhancements, as articulated by the United States Supreme Court in *Deschamps v. United States* (2013) 570 U.S. 254 (*Deschamps*). In accordance with the Sixth Amendment right to jury trial, this approach limits the sentencing court’s consideration to facts necessarily implied by the elements of a prior conviction, because

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<sup>3</sup> Prior to January 1, 2012, section 245, subdivision (a)(1), read: “Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years.”

such facts were proven beyond a reasonable doubt. (*Deschamps*, at p. 270.) Under this approach the court must compare the elements of the statute underlying the prior conviction to the elements of the applicable recidivist enhancement. (*People v. Navarette* (2016) 4 Cal.App.5th 829, 851-852.) Therefore, a prior offense can only be used to enhance a sentence under the “Three Strikes” law if its elements qualify it as a serious felony and strike offense. (*Id.* at p. 851.)

However, because the offense set forth in the former version of section 245, subdivision (a)(1) contains alternative elements and can therefore be violated in two different ways, one constituting a serious felony and one not constituting a serious felony, we concluded the abstract was ambiguous as to whether the prior conviction constituted a prior strike. Although the abstract of judgment designated the prior conviction as a serious felony, we could not ascertain whether the designation “was based on the elements of the offense as unanimously found beyond a reasonable doubt by the jury in that case, or, on the court’s own interpretation of the evidence presented at trial.” We further explained that, in accordance with *Deschamps*, a court may remedy ambiguity created by a statute containing alternative elements by employing the “modified categorical” approach. This approach allows the court to consider a limited range of approved record-based documents, including charging documents and jury instructions, to determine which of the alternative elements formed the basis for the defendant’s prior conviction. (*Deschamps, supra*, 570 U.S. at p. 263.)

### **III. Remand and Retrial**

Following remand, the trial court conducted a retrial on the truth of appellant’s prior conviction. At the retrial, the People introduced the following certified documents from the Orange County Superior Court: the information, the abstract of judgment, jury instructions, and minute orders. The information contained the following accusatory language:

“COUNT 1: On or about July 07, 2011, in violation of section 245 (a)(1) of the Penal Code (AGGRAVATED ASSAULT), a FELONY, JUAN CARLOS ESTRADA did willfully and unlawfully commit an assault upon the person of LIONEL G. with a deadly weapon and instrument, baseball bat.”

The minute orders state a jury found appellant “GUILTY as to count 1 as charged in the Original Information.” The abstract of judgment contains the same information as presented in the original trial: appellant was sentenced on September 13, 2013, for a violation of “PC 245(a)(1),” defined as “Assault with a deadly weapon other ...,” with a checked box indicating it is a “Serious Felony.” Finally, the jury instructions show the jurors received CALCRIM No. 875, an instruction covering both assault with a deadly weapon and assault with force likely to cause great bodily injury but redacted so the jurors were only instructed on the elements of assault with a deadly weapon.

Following retrial, the court found the prior strike allegation true.

### **DISCUSSION**

Appellant contends the trial court’s finding that he suffered a prior strike conviction was not supported by sufficient evidence. We disagree.

We review challenges to the sufficiency of the evidence under the substantial evidence standard. This standard of review applies to sentencing enhancements. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067; *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1232 [“When, as here, a defendant challenges on appeal the sufficiency of the evidence to sustain the trial court’s finding that the prosecution has proven all elements of the enhancement, we must determine whether substantial evidence supports that finding.”].) “To determine the sufficiency of the evidence ... we review the entire record in the light most favorable to the prosecution to determine whether it contains [substantial] evidence that is reasonable, credible and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt.” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955.) We “presume in

support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) “We need not be convinced of the defendant’s guilt beyond a reasonable doubt; we merely ask whether ‘ “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ’ ” (*Tripp, supra*, at p. 955, italics omitted.)

In accordance with the modified categorical approach we described in our prior opinion, the prosecution introduced several certified court documents that clarified the elements found by the jury beyond a reasonable doubt that formed the basis for appellant’s prior conviction. These documents conclusively show appellant’s prior conviction was based on a jury’s finding he violated section 245, subdivision (a)(1) by committing an assault with a deadly weapon. The information specifies the appellant was alleged to have committed the assault with a baseball bat. The court minutes show appellant was convicted “as charged in the Original Information.” The abstract of judgment indicated appellant’s prior conviction constituted a “serious” offense.

Most significant to our analysis, however, are the jury instructions, because they directly show the elements the jurors found true beyond a reasonable doubt. The jury was instructed with CALCRIM No. 875, which defines both assault with a deadly weapon and assault with force likely to cause great bodily injury. However, the instruction was modified to only provide the jury with the elements of assault with a deadly weapon. By reviewing the instruction, the trial court was able to ascertain the elements the jury found beyond a reasonable doubt, which reasonably led to the conclusion appellant’s prior conviction was based on the finding he committed an assault with a deadly weapon.

Appellant contends there was ambiguity in the jury instruction as modified that possibly mislead jurors into believing they could find defendant guilty based on the elements of assault with force likely to cause great bodily injury. He points to the fact that the court did not redact “OR FORCE LIKELY TO PRODUCE GREAT BODILY

INJURY” language from the heading of the second page of the CALCRIM No. 875 instruction, and that the court added the definition of great bodily injury to the end of the instruction. The final portion of the instruction read as follows:

“A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

“Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.”

We do not find the instruction ambiguous. The only reference to assault with force likely to cause great bodily injury is in the unredacted heading on the second page of the instruction. This appears to have been an oversight, and there is no other reference in the instructions to assault with force likely to cause great bodily injury. Additionally, the definition of “great bodily injury” appears to have been added to the end of CALCRIM No. 875 to define that term within the immediately preceding definition of a “deadly weapon.” There is no reason to believe its inclusion and placement would have lead a reasonable juror to believe it could find appellant guilty based on the elements of assault with force likely to result in great bodily injury. Therefore, the trial court’s finding on retrial was supported by substantial evidence.

### **DISPOSITION**

The judgment is affirmed.